SWISS RIBBONS AND ITS IMPLICATIONS

THE SUPREME COURT ON THE CONSTITUTIONALITY AND KEY PROVISIONS OF THE INSOLVENCY & BANKRUPTCY CODE

1. INTRODUCTION

2018 proved to be a constitutional litmus test for the Insolvency and Bankruptcy Code, 2016 (the "**Code**"), with ten writ petitions and one special leave petition assailing the constitutional validity of the Code. Various matters were brought into question and on January 25, 2019, a judgment was pronounced by the Supreme Court (the "**SC**") on this batch of petitions in *Swiss Ribbons Private Limited & Anr. v. Union of India*[1].

The key sub-text in *Swiss Ribbons* is set out in the Epilogue in the last three pages of the judgment:

"The Insolvency Code is a legislation which deals with economic matters and, in the larger sense, deals with the economy of the country as a whole. Earlier experiments, as we have seen, in terms of legislations having failed, 'trial' having led to repeated errors, ultimately led to the enactment of the Code. The experiment contained in the Code, judged by the generality of its provisions and not by so-called crudities and inequities that have been pointed out by the petitioners, passes constitutional muster."

This conclusion is a future interpretative tool for all stakeholders and more so, for participants in the corporate insolvency resolution process (the "**CIRP**"). The SC has tacitly admitted to the game theory element inherent in CIRPs, and the SC will not be readily swayed in allowing traditional common law safe harbour principles of equity, reasonableness and fairness prevailing over purposive economic legislation and policy.

In reaching its judgment, the SC acknowledged that such arguments have, over the last 7 decades, stymied India's insolvency regime. Ultimately, the SC found enough grist for the mill (drawing from its own precedents and comparative international jurisprudence) to stave off the challenges to constitutional validity of the Code.

Perhaps the only question of significance left unanswered in the judgment is the challenge to the RBI's circular dated February 12, 2019[2] directing lenders with distressed loans in the power sector to invoke the Code.

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[1] Available at https://ibbi.gov.in/webadmin/pdf/order/2019/Jan/25th%20Jan%202019%20in%20the%20matter%20of%20Swiss%20Ribbons%20Pvt.%20Ltd.%20&%20Anr.%20Writ%20Petition%20(Civil)%20No.%2037,99,100,115,459,598,775,822,849%20&%201221-2018%20In%20Special%20Leave%20Petition%20(Civil)%20No.%2028623%20of%202018_2019-01-25%2013:07:58.pdf

[2] Available at https://www.rbi.org.in/scripts/BS_CircularIndexDisplay.aspx?Id=11218

2. THE JUDGMENT

For now, we are not dealing with the entire gamut of issues arising in the context of the Code, for example the legitimacy of appointment of members of the National Company Law Tribunal (the "**NCLT**") and the National Company Law Appellate Tribunal (the "**NCLAT**"), the direction to expedite formation of NCLAT circuit benches, the shifting of administrative support being provided to the Ministry of Law and Justice (from the Ministry of Corporate Affairs as it currently stands). We have instead focussed on the more substantive constitutional challenges to:

(a) The differential treatment of 'financial creditors' and 'operational creditors' running through the genetic make-up of various sections;

(b) Section 29A disqualifiers, which was *primarily* intended to prevent defaulting promoters from misusing the Code and gaming the system; and

(c) Section 12A, which appears to have a seemingly contrarian standpoint to the above, in that it permits the self-same errant promoters (sought to be disqualified by Section 29A) to buy back their enterprises.

3. MAJOR ISSUES

3.1 Role of the judiciary in economic legislation

This is the overarching theme permeating through all the other substantive issues considered in the *Swiss Ribbons* judgment. The SC provides a welcome insight into the approach required in dealing with the Code as *economic* legislation. Predicated on the statement of objects, the preamble and the copious jurisprudential background leading to the formulation of the Code, the SC draws from both foreign and its own precedents to assert a hands-off approach in relation to economic legislation.

As a prologue to the judgment, the SC sets the tenor, emphasizing that:

(a) *"There may be crudities and inequities in complicated experimental economic legislation but on that account alone it cannot be struck down as invalid";*

(b) *"The Court must therefore adjudge the constitutionality of such legislation by the generality of its provisions and not by its crudities or inequities or by the possibilities of abuse of any of its provisions";*

(c) *"The Court must defer to legislative judgment in matters relating to social and economic policies and must not interfere, unless the exercise of legislative judgment appears to be palpably arbitrary";* and

(d) *"The system of checks and balances has to be utilized in a balanced manner with the primary objective of accelerating economic growth rather than suspending its growth by doubting its constitutional efficacy at the threshold itself"*.

This is then bookended in the Epilogue with telling observations:

(a) *"To stay experimentation in things economic is a grave responsibility, and denial of the right to experiment is fraught with serious consequences to the nation"*;

(b) *"We are happy to note that in the working of the Code, the flow of financial resource to the commercial sector in India has increased exponentially as a result of financial debts being repaid"; and*

(c) *"Ultimately, the total flow of resources to the commercial sector in India, both bank and non-bank, and domestic and foreign (relatable to the non-food sector) has gone up from a total of INR 14530.47 crores in 2016-2017, to INR 18469.25 crores in 2017-2018, and to INR 18798.20 crores in the first six months of 2018-2019. These figures show that the experiment conducted in enacting the Code is proving to be largely successful"*.

Each challenge to the constitutional validity of the Code was tested on these touchstones and found wanting.

3.2 Differential treatment between 'financial creditors' and 'operational creditors'

The principal argument of the petitioners was that there is no *intelligible differentia* having relation to the objects sought to be achieved by the Code between financial and operational creditors; indeed, nowhere in the world has this distinction been made; and therefore, it was alleged to be *discriminatory* in effect.

The SC however concluded that the distinction is "*neither discriminatory, nor arbitrary, nor violative of Article 14 of the Constitution of India*". It reached this conclusion after an elaborate 52-page analysis, replete with a dissection of various sections of the Code, the *minutiae* contained in regulations (and even certain forms and notices), commentaries from the Bankruptcy Law Reform Committee Report (the "**BLRC Report**"), the Insolvency Law Committee Report and the Joint Parliamentary Committee Report, which even included a counterpoint extracted from the UNCITRAL Legislative Guide on Insolvency Law.

The essence of the decision lay in the fact that *financial creditors* have a better understanding of the business and viability of the corporate debtor owing to techno-evaluative studies conducted by them prior to lending, and a long-term interest based on the large amount of loans that are involved. This issue now appears to have been bedded down with finality, with nearly every provision and procedure of the Code posited upon this distinction being stress-tested robustly in the judgment.

Section 53 was analysed separately. This section lays down the *hierarchy* of claims and the priority in distribution of assets (or the so-called *waterfall*) in liquidation. The Code accords primacy to secured claims (invariably the preserve of *financial creditors*). Unsecured claims (usually the situation *operational creditors* find themselves in) are given the lowest priority.

This *pecking order* of claims in the past, it may be recalled, was seriously distorted, especially with governmental claims of various hues ranking alongside and often ahead of financial creditors.

In summary, the SC found sufficient *intelligible differentia* justifying the differential treatment accorded to financial and operational creditors and concluded: "*it can be seen that unsecured debts are of various kinds, and so long as there is some legitimate interest sought to be protected, having relation to the object sought to be achieved by the statute in question, Article 14 does not get infracted. For these reasons, the challenge to Section 53 of the Code must also fail*".

3.3 Constitutional validity of Section 29A

Section 29A basically sets out *ineligibility criteria* for resolution applicants under the Code. It was enacted evidently as an afterthought, first by way of an ordinance and thereafter by an amendment on November 23, 2017. Arun Jaitley, the then finance minister of India went on record to state:

"*Effectively, this clause will mean that those, who are in management and on account of whom this insolvent or the non-performing asset has arisen, will now try and say, I do not discharge any of the outstanding debts in terms of making the accounts operational, and yet I would like to apply and get the same enterprise back at a discounted value, for this is not the object of this particular Act itself. So clause [5] has been brought in with that purpose in mind.*"

This apprehension is expressly stated in the *Statement of Objects and Reasons* for the amendment:

"*Concerns have been raised that persons who, with their misconduct contributed to defaults of companies or are otherwise undesirable, may misuse this situation due to lack of prohibition or restrictions to participate in the resolution or liquidation process, and gain or regain control of the corporate debtor*".

A clear and present danger was perceived at that time - that *errant* promoters were gaming the system. It was deemed necessary not only to swiftly amend the Code but to also go a step further in applying the amendment with *retrospective* effect. This was ostensibly done to prevent a *back-door entry* by such errant promoters.

A multi-pronged Constitutional challenge was launched against Section 29A in *Swiss Ribbons,* on the following grounds:

(a) *Vested rights* of erstwhile promoters to participate in the recovery process of a corporate debtor have been impaired by retrospective application of Section 29A;

(b) A blanket ban on participation of all promoters, without differentiating between unscrupulous and sincere promoters is manifestly arbitrary and "treats unequals as equals". "*A good erstwhile manager cannot be lumped with a bad erstwhile manager*";

(c) Maximization of the value of assets is an important goal to be achieved in the resolution process. Section 29A is contrary to such goal as an erstwhile promoter, who may outbid all other applicants and may have the best resolution plan, would be kept out at the threshold;

(d) A person's account may be classified as a non-performing asset (an "**NPA**") in accordance with RBI guidelines despite him not being a *wilful defaulter*. Further the period of one year is arbitrary; (the disqualifier being where a person's account has been an NPA for a year); and

(e) Persons who may be related parties in the sense that they may be relatives of the erstwhile promoters are also debarred, even though they may have no business connection with the erstwhile promoters who have been rendered *ineligible* by Section 29A.

Between August 2018 and October 2018, the SC had the opportunity to dwell extensively on the issue of *vested rights* of erstwhile promoters, in the cases of *Chitra Sharma*[3] and in *ArcelorMittal*[4]. The SC had already concluded that promoters had no *vested rights* to be considered as resolution applicants. Since the fundamental assumption (that there is a *vested right*) had already been negated (particularly in *ArcelorMittal*), the assertion that this right is abrogated by retrospective application found no traction with the SC.

The SC found no merit in the argument that the ineligibility conditions in Section 29A treats unequals as equals. Section 29A disqualifiers bring within its ambit a variety of persons and it is not based on any requirement to evidence malfeasance (or for that matter, any other fault-based liability).

[3] Chitra Sharma v. Union of India, Writ Petition (Civil) No. 744 of 2017 [decided on 09.08.2018]; available at https://ibbi.gov.in/webadmin/pdf/order/2018/Aug/25878_2017_Judgement_09-Aug-2018_2018-08-09%2013:01:40.pdf

[4] ArcelorMittal India Private Limited v. Satish Kumar Gupta and Ors., Civil Appeal Nos. 9402-9405/2018 [decided on 04.10.2018]; available at https://ibbi.gov.in/webadmin/pdf/order/2018/Oct/33945_2018_Judgement_04-Oct-2018_2018-10-04%2015:36:20.pdf

For example, an undischarged insolvent is disqualified not on account of any fault, but because he is simply unfit or considered undesirable to acquire or manage an enterprise. So, painting a defaulting but otherwise diligent promoter and an unscrupulous promoter with the same brush is not arbitrary – both have failed equally on account of the default. On the other hand, it is more a *fit and proper person* test enacted in the larger public interest and to facilitate effective corporate governance.

The argument in (d) above was countered with rigorous reference to the RBI's guidelines on income recognition and classification and the mechanics involved in the determination of NPAs and their treatment. The SC concluded that this is legislative policy, the SC will not interfere and in any case, the RBI's guidelines provide enough justification. A person who is unable to service his own debt beyond the grace period of one year and three months (at which stage it is classified as a *doubtful asset)*, is unfit and cannot be an eligible resolution applicant. Neither can this policy be found fault with, nor can the period of one year be questioned, as this is a policy matter decided by the RBI.

The argument in (e) above was articulated essentially as an act of legislative overreach – the mere fact that somebody happens to be a relative of an *ineligible person* cannot be good in law to oust such person from becoming a resolution applicant, if he is otherwise qualified. The SC however found that in the scheme of the Code, the definitions of "*related party*", "*relative*" and the explanation of "*connected person*", when read together harmoniously in reference to each other, dispel any notion of any arbitrary imposition of disbarment.

The SC therefore held that: "*persons who act jointly or in concert with others are connected with the business activity of the resolution applicant…In the absence of showing that such person is "connected" with the business of the activity of the resolution applicant, such person cannot possibly be disqualified under Section 29A(j)*."

Conspicuously, the SC appears to have left the argument in (c) above unanswered. This pertains to the argument that disentitling promoters (who could potentially outbid other resolution applicants) goes against the tenet of value maximisation. A plausible surmise for this omission is perhaps that the Code answers this with the introduction of a new section 12A.

3.4 **Section 12A passing constitutional muster**

Prior to the insertion of section 12A, once a corporate debtor is admitted to insolvency, the only two options available under the Code were the continuation of, or sale of all or part of the existing business, as a going concern; *or* the winding up and liquidation of the company with the distribution of its assets to creditors and other stakeholders.

In *Lokhandwala Kataria*[5] and *Uttara Foods*[6], the SC's inherent jurisdiction was invoked to manufacture a third option, which was to allow promoters the opportunity to arrive at a settlement and seek withdrawal of the CIRP. In exercise of its powers under Article 142 of the Constitution, the SC passed orders allowing the withdrawal of applications even *after* creditors' applications had been admitted by the NCLT or the NCLAT. Thereafter, on the recommendation of the Insolvency Law Committee, the new section 12A was introduced in June 2018.

Section 12A essentially permits the *withdrawal* of the CIRP application by the *applicant* post admission, *provided* the Committee of Creditors (the "**CoC**") approves such withdrawal by a voting share of ninety per cent. The section itself is open and silent on the circumstances when this provision could be brought into play. No doubt though that it is really premised on the promoter offering a settlement or presenting a settlement plan.

It was argued in *Swiss Ribbons* that the: "*unbridled and uncanalized power was given to the committee of creditors to reject legitimate settlements entered into between creditors and the corporate debtors*". This argument did not sway the SC, which held that once admitted, the CIRP becomes *in rem and is no longer an individual proceeding but a collective proceeding*. All stakeholders in the corporate debtor have an interest in the matter. In certain instances, settlements were allowed by the NCLT, NCLAT and the SC, but this was amongst the corporate debtor and *all* its creditors (*not just between the corporate debtor and the applicant creditor*).

In this context, the BLRC Report had observed that the design of the Code was based on ensuring that: "*all key stakeholders will participate to collectively assess viability. The law must ensure that all creditors who have the capability and the willingness to restructure their liabilities must be part of the negotiation process. The liabilities of all creditors who are not part of the negotiation process must also be met in any negotiated solution.*"

Where matters of all the stakeholders are to be decided, it is already established that financial creditors are best placed to take the call. Ninety percent is a sufficiently high threshold, and if met, should be taken seriously. The SC observed that "*the figure of ninety per cent, in the absence of anything further to show that it is arbitrary, must pertain to the domain of legislative policy*".

Controversially, the SC further commented in paragraph 53 of the judgment that under Section 60 of the Code, the CoC is not the ultimate decision maker on the subject: "*Also, it is clear, that under Section 60 of the Code, the committee of creditors do not have the last word on the*

[5] *Lokhandwala Kataria Construction Private Limited* v. *Nisus Finance and Investment Manager LLP* (Civil Appeal No. 9279 of 2017), available at: https://ibbi.gov.in/LokhandwalaKatariaConstruction9279of2017.pdf

[6] *Uttara Foods and Feeds Private Limited* v. *Mona Pharmachem* Civil Appeal No. 18520 OF 2017 (Arising out of SLP(C) No. 26824 of 2017), available at: https://www.sci.gov.in/supremecourt/2017/31542/31542_2017_Order_13-Nov-2017.pdf

subject. If the committee of creditors arbitrarily rejects a just settlement and/or withdrawal claim, the NCLT, and thereafter, the NCLAT can always set aside such decision under Section 60 of the Code."

This *observation* strikes a discordant note, in an otherwise dispassionate hands-off approach endorsed in the rest of the judgment, especially if it permits the future judicial policing of otherwise commercial decisions. Did the SC unintentionally trip the symmetry of its own judgment by over-clarifying and introducing *checks and balances* that should not exist? Or is this merely a red-herring?

Section 60, and more particularly section 60(5) is a *sweeper*. It confers residuary jurisdiction on the NCLT and NCLAT for matters and causes of action not already provided for elsewhere in the Code. Therefore, the *clarificatory observation* above would suggest that a rebuffed promoter (who could not garner the 90 per cent support of the CoC, or where the CoC simply refuses to put it up for voting) is free to approach the NCLT and claim that his *just* settlement plan was arbitrarily rejected.

Primarily for these reasons, the SC took the view that Section 12A also passed constitutional muster, though the *clarificatory observation* discussed above was perhaps unnecessary and potentially dissonant with the rest of the judgment, going against the grain of the Code. We will revisit this question in the next section.

4. INDUSLAW VIEW

We should perhaps firstly note that the Insolvency Bankruptcy Board of India has reported positively on matters admitted for the CIRP.[7] The *Swiss Ribbons* judgment recognizes that the Code has resulted in an exponential increase in credit flow into the commercial sector owing to the repayment of financial debts.

Out-of-court settlements seem to have played a large role in this. Clearly, the judiciary will endorse the cause of economic experimentation and will not intrude into the legislative domain; and this will afford room to best attain the objectives of the Code. The SC has set out its approach on the method of interpreting and treating challenges under the Code, essentially prioritising purpose over literal interpretation.

In its treatment of the Code as *economic* legislation, it will not hesitate to quash arguments premised merely on notions of *fairness* or *reasonableness* or mere legal technicality, which do not account for practical and commercial consideration. Aptly, the judgment closes with the following words: "*The defaulter's paradise is lost. In its place, the economy's rightful position has been regained. The result is that all the petitions will now be disposed of in terms of this judgment.*"

[7] Quarterly Newsletter of IBBI for October to December 2018 is available at: https://ibbi.gov.in/QUARTERLY_NEWSLETTER_FOR_OCT_DEC_2019.pdf

But let us now revisit the potentially discordant observation planted in paragraph 53 of the *Swiss Ribbons* judgment discussed above: *If the committee of creditors arbitrarily rejects a just settlement and/or withdrawal claim, the NCLT, and thereafter, the NCLAT can always set aside such decision under Section 60 of the Code*.

The continuing insolvency resolution process relating to Essar Steel India Limited ("**ESIL**") provides us with an opportunity to test the above proposition in real time, as it unfolds during the course of this month.

On January 29, 2019, three days *after* the *Swiss Ribbons* judgment, the NCLT *rejected* an ostensible settlement plan for ESIL put forward by its promoter, Essar Steel Asia Holdings Ltd ("**ESAH**"). The rejection however was not based on the proposition in *Swiss Ribbon*, inasmuch that the NCLT could assume jurisdiction under Section 60. The NCLT was required to make this decision based on the SC's diktat in *ArcelorMittal.*

In the *ArcelorMittal* judgment of October 4, 2018, the SC was called upon to decide on the validity of resolution plans submitted by *ArcelorMittal* and *Numetal*, both of whom had fallen foul of Section 29A. In a one-off dispensation under Article 142 of the Constitution, the SC thought it proper to provide a grace period of two weeks to both applicants to pay-off their NPAs, and thereby *cure* their disqualifications and resubmit their resolution plans, along with *Vedanta*.

Thereafter, the CoC would have an eight-week period to accept, by the requisite majority, the best amongst the re-submitted resolution plans. The SC rightly made it clear that if no plan was found worthy of acceptance, ESIL would go into liquidation.

By the October 19th deadline, *ArcelorMittal* had cleared NPAs worth INR 7,469 crores linked to *Uttam Galva* and *KSS Petron*, and the CoC approved its resolution plan offer of INR 42,000 crores with a vote of ninety two percent. This resolution plan was then placed before the NCLT for approval. On October 25, 2019, ESAH made an offer by way of a settlement plan for an amount of Rs. 54,839 crores, in a last-ditch effort to regain ESIL, invoking Section 60(5) of the Code, arguing that its settlement plan *must* be considered on a similar footing as the principle established by section 12A of the Code.

On January 29, 2019, the NCLT not only had to consider the *Swiss Ribbons* judgment (pronounced three days earlier), but to also harmonise with the October 4, 2018 judgment in *ArcelorMittal.* The NCLT *rejected* ESAH's application for the following principal grounds (among others).

Firstly, in the backdrop of the *ArcelorMittal* judgment, NCLT's brief was restricted. The jurisdiction of the NCLT under Section 60(5) was already abrogated. The SC's dispensation was really a one-off special order under Article 142 of the Constitution, with the order stating that if no plan was found worthy of acceptance, ESIL would go into liquidation. There

required to be either an acceptance of one of the three resolution plans, or a liquidation, with no room for a third option. The potentially discordant observation in *Swiss Ribbons* could not be tested in these circumstances.

Secondly, the NCLT now quoted *Swiss Ribbons* (specifically paragraphs 49 to 51, which were reproduced verbatim in the NCLT's order) and clarified that Section 12A of the Code requires the affirmative voting of ninety per cent of the members of the CoC for allowing withdrawal. Furthermore, it emphasised that the application must be moved by the applicant creditor and *not* the promoter shareholder. Essentially, ESAH did not have the right to have its rescue bid considered or accepted.

As discussed above, contrasting the NCLT's decision in *ArcelorMittal* with the discordant lines of paragraph 53 of the SC's judgment in *Swiss Ribbons,* we see an uncomfortable conflict over whether the CoC's decision to reject a settlement plan under Section 12A is justiciable.

Might ESAH be entitled to seek judicial intervention on a claim that the CoC has arbitrarily rejected or failed to consider its just settlement offer? On the face of it, when comparing the offered settlement of INR 42,000 crores by ArcelorMittal with INR 54,839 crores offered by ESAH, any reasonable CoC might be expected to certainly pick the latter? And if the CoC did reject the promoter's rescue bid, shouldn't there be good reasons to forego the additional Rs 12,000 crores?

This is certainly much more than a billion-dollar question. Given the tenor of the *Swiss Ribbons* judgment, if a purposive interpretation is to be favoured for experimental economic legislation, then the SC should certainly be asked to revisit the four pillars holding up the objects of the Code, namely:

- Insolvency resolution in a time bound manner;
- Maximisation of value of the assets;
- The promotion of entrepreneurship and the availability of credit; and
- The balance the interest of all stakeholders.

If ESAH can provide proof of funds (and that could be a big *if* too), the recovery of INR 54,839 crores in about 450 days could possibly be the biggest NPA recovery event ever, and that too in record time, in the Indian context. There is also the collateral benefit, in that INR 7,469 crores have already been recovered from ArcelorMittal for NPAs of *Uttam Galva* and *KSS Petron*.

To go a step further, it is worth revisiting the Epilogue in *Swiss Ribbons*. The SC states with approval: "*Ultimately, the total flow of resources to the commercial sector in India, both bank and*

non-bank, and domestic and foreign (relatable to the non-food sector) has gone up from a total of INR 14,530.47 crores in 2016-2017, to INR 18,469.25 crores in 2017-2018, and to INR 18,798.20 crores in the first six months of 2018-2019. These figures show that the experiment conducted in enacting the Code is proving to be largely successful." These figures would look almost paltry if ESAH's settlement plan is accepted (and the INR 7,469 crores paid by ArcelorMittal towards *Uttam Galva* and *KSS Petron* would only add to what would be a remarkable year for recoveries).

Admittedly, ESAH's settlement plan has no *prima facie* right of acceptance under Regulation 30A of the CIRP Regulations, which requires the applicant (in this case, the *financial creditor*) to initiate the withdrawal of proceedings and with a positive vote of 90 percent of the CoC. The shareholders certainly cannot initiate withdrawal, which is entirely in the hands of the applicant creditor who initiated CIRP.

But again, we come back to the question of whether the discordant lines in paragraph 53 of *Swiss Ribbons* give ESAH the right to argue that the CoC *arbitrarily rejected* what on the face of it appears to be a *just settlement* and that the CoC does not have the last word on the subject?

Alternatively, can ESAH's rescue plan be blocked on the ground that it will cause (or has already caused) inordinate delay? Can it be blocked on the ground that it is too late (certainly not too little though)?

In this regard, it is helpful to emphasise that Regulation 30A of the CIRP Regulations[8] stipulates that a *withdrawal* under Section 12A cannot be permitted after an invitation for expression of interest is issued to the public for prospective resolution applicants.

However, ESAH might find some comfort again from the SC, which in the case of *Brilliant Alloys*[9], dated December 14, 2018 stated that Regulation 30A must be read in context of the main provision of Section 12A. Section 12A itself contains no such deadline.

Accordingly, this deadline can only be construed as *directory* depending on the facts of each case. Interestingly, *Swiss Ribbons* reaffirms this by quoting that: "*Regulation 30A(1) is not mandatory but is directory for the simple reason that on the facts of a given case, an application for withdrawal may be allowed in exceptional cases even after issue of invitation for expression of interest under Regulation 36A*".

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[8] Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016

[9] *Brilliant Alloys Private Limited* v. *Mr. S. Rajagopal & Ors.*, Petition(s) for Special Leave to Appeal (C) No(s). 31557/2018 (Arising out of impugned final judgment and order dated 01-11-2018 in MA No. 536/2018 passed by the National Company Law Tribunal, Divisional Bench, Chennai); available at https://ibbi.gov.in/webadmin/pdf/order/2019/Jan/1st%20Nov%202018%20in%20the%20matter%20of%20Brilliant%20Alloys%20Private%20Limited%20Vs.%20S.%20Rajagopal%20&%20Ors.%20Appeal%20(C)%20No(s).%2031557-2018_2019-01-04%2012:19:51.pdf

If this proposition were to be accepted, where would this leave ArcelorMittal? We already know that the resolution applicant is not really a stakeholder with inherent rights. So, if the above scenario plays out, ArcelorMittal might suddenly find itself disgorged of Rs. 7,469 crores with nothing to show for it?

The scheme of the Code, the extensive jurisprudential narrative in the BLRC Report and the ILC Report, and even the SC's otherwise purposive interpretation in *Swiss Ribbons*, have all placed much emphasis on ruling out *equity*, *fairness* or *reasonableness* in determining the insolvency resolution process. Must we now go back and read them into what should otherwise be a commercial decision, the purpose of which is given primacy through the Code? Surely, it cannot be the case that the NCLT, the NCLAT or for that matter, even the SC should have any *locus standii* to double guess the commercial wisdom of the CoC?

On February 5, 2019 (eleven days after *Swiss Ribbons* and eight days after the ESAH's NCLT order), a different bench of the SC was perhaps able to restore some equilibrium and bring about some course correction. In *K.Sashidhar v Indian Overseas Bank*[10], the SC was seized with a similar question. The central issue was where dissenting creditors had rejected a resolution plan, could the NCLT and NCLAT reverse the decision and function as a court of equity?

The argument was that voting by the *dissenting* financial creditors suffers from the vice of being unreasonable, irrational, unintelligible and an abuse of exercise of power. It was argued that the power bestowed on *financial creditors* to cast their vote is coupled with a *duty* to exercise that power with utmost care, caution and reason, keeping in mind the legislative intent and the spirit of the Code. The fullest attempt to *revive* the corporate debtor rather than permit liquidation, with its broader implications for the public, stakeholders and associated workers.

The SC was lucid in its pronouncements in *K.Sashidhar*. In the context of the Code, the above argument really does not and should not hold, regardless of the red herring in *Swiss Ribbon*. The operative parts of the judgment are reproduced below:

"The argument, though attractive at the first blush, but if accepted, would require us to re-write the provisions of the I&B Code. It would also result in doing violence to the legislative intent of having consciously not stipulated that as a ground - to challenge the commercial wisdom of the minority (dissenting) financial creditors.

[10] Available at https://ibbi.gov.in/webadmin/pdf/order/2019/Feb/K%20Sashidhar%20Vs%20Indian%20Overseas%20Bank%20&%20Ors%20Civil%20Appeal%20No.%2010673-2018%20with%20CA%20No.%2010719%20-2018%20CA%20No.%2010971%20-2018%20and%20SLP%20(C)%20No.%2029181_2019-02-06%2010:31:11.pdf

The NCLT cannot make any other inquiry nor is competent to issue any direction in relation to the exercise of commercial wisdom of the financial creditors be it for approving, rejecting or abstaining, as the case may be.

Indubitably, the legislature has consciously not provided for a ground to challenge the justness of the "commercial decision" expressed by the financial creditors – be it to approve or reject the resolution plan. The opinion so expressed by voting is non-justiciable.

If the opposition to the proposed resolution plan is purely a commercial or business decision, the same, being nonjusticiable, is not open to challenge before the Adjudicating Authority (NCLT) or for that matter the Appellate Authority (NCLAT). If so, nonrecording of any reason for taking such commercial decision will be of no avail.

In such a case, nonrecording of reasons would not per se vitiate the collective decision of the financial creditors. The legislature has not envisaged challenge to the "commercial/business decision" of the financial creditors taken collectively or for that matter their individual opinion, as the case may be, on this count.

We are afraid, it is not possible for us to exercise powers under Article 142 of the Constitution which will result in issuing directions in the teeth of the provisions.

We conclude by emphasising that the CIRP does indeed have a strong inherent *game theory* element, and the SC has tacitly admitted to this. We are of the view that this is the correct view and should also apply with equal vigour to *settlement plans* for they are *pari materia* with resolution plans.

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Practice Areas: Insolvency & Restructuring | Litigation & Dispute Resolution

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